

THE APPEALS CHAMBER (“Appeals Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Justice George Gelaga King, Presiding Judge, Justice Emmanuel Ayoola, Justice Renate Winter, Justice Raja N. Fernando and Justice Jon M. Kamanda;

NOTING the Trial Chamber’s “Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case” of 6 December 2007 (“Impugned Decision”);

SEISED of the “Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case” filed jointly by the Appellants on 12 December 2007 (“Appeal”);

NOTING the Addenda and Corrigenda to Sesay’s and Gbao’s Notices of Appeal, filed on 13 December 2007 and 14 December 2007 respectively,¹ and the Corrigendum to Kallon’s Notice of Appeal filed on 13 December 2007;²

CONSIDERING the “Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case,” filed on 14 December 2007 (“Response”)³ and the Reply thereto, filed jointly by the Appellants on 17 December 2007 (“Reply”);⁴

HEREBY DECIDES this Appeal on the basis of the written submissions:

A. Introduction

1. On 14 November 2007, Issa Hassan Sesay and Augustine Gbao filed a Joint Motion for the voluntary withdrawal or disqualification of Hon. Justice Bankole Thompson from the case of *Prosecutor v. Sesay, Kallon and Gbao* (“Joint Motion”) based on comments contained in his

¹ Addendum to Sesay Notice of Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 13 December 2007; Addendum and Corrigendum to Gbao Notice of Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 14 December 2007.

² Corrigendum to Kallon Notice of Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 13 December 2007.

³ Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 December 2007 (“Response”).

⁴ Sesay Reply to Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 17 December 2007; Kallon Reply to Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 17 December 2007; Gbao Reply to Prosecution Consolidated Response to the Sesay, Kallon and Gbao

Separate Concurring and Partially Dissenting Opinion to the Judgment in *Prosecutor v. Fofana and Kondewa* (“Separate Opinion”).⁵ Morris Kallon subsequently filed a Statement in Support of the Joint Motion on 20 November 2007, joining Sesay and Gbao. Sesay, Kallon and Gbao (the “Appellants”) claimed that Justice Thompson used certain terms and expressions in his Separate Opinion, such as tyranny, anarchy, rebellion,⁶ and evil⁷ which raise reasonable doubts as to his impartiality in ruling on the RUF case.

2. On 6 December 2007, Trial Chamber I rendered a decision denying the Joint Motion (“Impugned Decision”).⁸ The Trial Chamber held that when understood and viewed in the context of the ongoing proceedings in the *Sesay et al.* trial, the language used in Justice Thompson’s Separate Opinion evinced “some indicia of an appearance of bias.”⁹ However, the Trial Chamber found that the language used was “not sufficient to overcome the high threshold standard . . . [for] the recusal or the disqualification of a Judge . . . and therefore . . . [did] not rebut the presumption of impartiality . . . [or] firmly establish a reasonable appearance of bias on the part of Hon. Justice Thompson.”¹⁰ Sesay, Kallon and Gbao now appeal the Impugned Decision.

B. Submissions of the Parties

3. The Appellants’ extensive submissions on appeal can be summarised as follows:
- a. The Trial Chamber erred in law in its interpretation and application of the standard of review for recusal or disqualification;¹¹
 - b. The Trial Chamber erred in law and fact in finding that despite finding ‘some indicia of an appearance of bias’ existed, it did not merit disqualification.¹²
 - c. The Trial Chamber erred in law and fact by finding that the language used by Justice Thompson in his Separate Opinion did not “necessarily imply criminality” of the Appellants.¹³

Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 17 December 2007 (“Reply”).

⁵ *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, 2 August 2007 (“Separate Opinion”).

⁶ Separate Opinion, paras. 69, 88, 90, 91(ii).

⁷ Gbao Notice of Appeal, paras. 16; Sesay Notice of Appeal, para. 14.

⁸ *Prosecutor v. Sesay, Kallon & Gbao*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 December 2007 (“Impugned Decision”).

⁹ Impugned Decision, para. 84.

¹⁰ Impugned Decision, para. 94.

¹¹ Kallon Notice of Appeal, paras. 9-10 & 24-29.

¹² Kallon Notice of Appeal, para. 11, Gbao Notice of Appeal, paras. 14-16 & 21; Sesay Notice of Appeal, para. 8, 18 & 29.

4. In response, the Prosecution submit that the Appellants failed to demonstrate that the Trial Chamber committed an error of law, misapplied the law or facts or otherwise abused or exceeded its discretion in making its findings.¹⁴

5. In reply, the Appellants reiterate earlier contentions and further submit that:

- a. The Prosecution's Response fails to address the issue of whether the Appellants have a legitimate reason to fear that Justice Thompson lacks impartiality and whether such fear could be objectively justified.¹⁵
- b. Justice Thompson's Separate Opinion evinces a predisposition against the RUF which objectively creates the perception that his ability to rule upon the RUF impartially may be 'irreparably impaired'.¹⁶

C. Standard of Review

6. Article 20(1) of the Statute of the Special Court ("the Statute") and Rule 106 of the Rules of Procedure and Evidence ("the Rules"),¹⁷ provide that the Appeals Chamber shall hear appeals on the following grounds: (a) A procedural error; (b) An error on a question of law invalidating the decision; or (c) An error of fact which has occasioned a miscarriage of justice.¹⁸

7. The standard of review on appeal is well-established. When an appeal is brought on the basis of an error of law, the Appeals Chamber as the final arbiter of the law must determine whether such an error was in fact made and whether the error renders the decision invalid.¹⁹

D. Standard for Disqualification

8. The Appellant's right to be tried by an independent and impartial tribunal is integral to his right to a fair trial guaranteed under Article 17 of the Statute. Article 13(1) of the Statute further provides that "the Judges of the Special Court shall be persons of high moral character, impartiality

¹³ Kallon, paras. 13, 18 & 19; Sesay, paras. 13-17.

¹⁴ Prosecution Response, paras. 3 – 4.

¹⁵ Gbao Reply, para. 2.

¹⁶ Gbao Reply, para. 7.

¹⁷ Special Court for Sierra Leone, Rules of Procedure and Evidence, as amended 13 May 2006 ("the Rules").

¹⁸ Article 20 of the Statute, Rule 106.

¹⁹ *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Appeals Judgment, 21 July 2000, ("*Furundzija Appeal Judgment*") para. 36.

and integrity ...”²⁰ A Judge who sits “at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground” must be disqualified.²¹

9. The Statutory provisions for impartiality require that a Judge should not only be subjectively free from bias but also, that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. In considering subjective impartiality, the personal impartiality of a Judge must be presumed until there is proof to the contrary. In relation to the objective test, this requires that the Judge is not only impartial but also appears to be impartial. Furthermore, the threshold for an appearance of bias does not require proof of actual bias.

10. The Appeals Chamber must determine if there are ascertainable facts which may raise doubts as to impartiality. In doing so, it must decide whether there is a legitimate reason to fear that the Judge in question lacks impartiality. Although the standpoint of an accused is important, it is not decisive. What is decisive is whether this fear can be objectively justified. That is “whether an independent bystander so to speak or the reasonable man ... will have a legitimate reason to fear [that the Judge] lacks impartiality” or “whether one can apprehend bias.”²²

11. In turn, the ‘reasonable man’ is “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold.”²³

E. Discussion

12. The crux of this appeal is whether the Trial Chamber erred in failing to disqualify Hon. Justice Thompson, despite its finding that “some indicia of an appearance of bias have been established.”²⁴

²⁰ Article 13(1) of the Statute.

²¹ Rule 15(A).

²² *Prosecutor v. Issa Hassan Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, (“Justice Robertson Disqualification Decision”) para. 15; see also, *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14, Decision on the Motion to Recuse Judge Winter from the deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, (“Justice Winter Disqualification Decision”); *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Appeals Judgment, 21 July 2000, (“Furundzija Appeal Judgment”) para. 189; *Prosecutor v. Celebici*, IT-96-21-A, Appeal Judgment, 20 February 2001 (“Celebici Appeal judgment”), para. 682; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, para. 9.

²³ *Furundzija Appeal Judgment*, para. 189; TC Decision para. 53; *Prosecutor v. Radoslav Brdjanin*, IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, (“Brdjanin”), para. 7

²⁴ Impugned Decision, para. 84.

13. The Appeals Chamber finds that the Trial Chamber erred in considering that ‘indicia of appearance of bias’ did not amount to a reasonable appearance of bias. The Appeals Chamber considers the law on judicial impartiality to clearly establish that ‘a reasonable apprehension of bias’ is a sufficient basis for disqualification.²⁵ It necessarily follows that where a Trial Chamber finds ‘some indicia of bias,’ the logical and reasonable conclusion must be that the Judge is disqualified. To the extent that the Trial Chamber found that ‘indicia of an appearance of bias’ was not sufficient to disqualify the Judge, it erred in law.

14. The next question for the Appeals Chamber is whether this error invalidates the Trial Chamber’s decision. The Appeals Chamber finds that no objective appearance of bias can reasonably be ascertained from Justice Thompson’s Separate Opinion. The Separate Opinion was issued in the exercise of Justice Thompson’s function as a Judge in a separate case. It contains no explicit or implied reference to the Appellants or any reference to the RUF as a group. The Appellants cite no legal authority nor have they demonstrated that suggesting that a Judge’s legal and factual analysis in a case to which they are not a party could be considered to give rise to an appearance of bias. This is even more so when the party in question is neither mentioned nor alluded to by the Judge.

15. It is inevitable that some connection can be made between judicial opinions in cases before the Special Court because each case ultimately relates to the same period of conflict. But a judicial opinion that merely has some connection to a case can not raise a question of bias nor can it raise a substantive claim for disqualification.

²⁵ *Justice Robertson* Disqualification Decision, para. 15; *Justice Winter* Disqualification Decision; *Furundzija Appeal Judgment*, para. 189; *Celebici Appeal judgment*, para. 682; *Karemera et al.*, para. 9; see also, *Prosecutor v. Vojislav Seselj*, IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003; *Brdjanin*, para. 6; *Prosecutor v. Momcilo Krajisnik*, IT-00-39-PT, Decision by a single Judge on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003.

²⁵ Impugned Decision, para. 54.

16. The Trial Chamber's error therefore does not invalidate its decision because a reasonable and informed observer reading Justice Thompson's opinion would not apprehend bias against the Appellants.

For these reasons the Appeals Chamber **DISMISSES** the Appeal.

Dated this 24 Day of January 2008.

Justice George Gelaga King
Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja Fernando

Justice Jon M. Kamanda

